EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 14 CR. 272 (JSR)
Trial

ANTHONY ALLEN and ANTHONY CONTI,

Defendants.

----------x

New York, N.Y.
October 19, 2015
9:10 a.m.

Before:

HON. JED S. RAKOFF,

District Judge
and a Jury

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BRIAN R. YOUNG
CAROL SIPPERLY
MICHAEL T. KOENIG
Assistant United States Attorneys

WILLKIE & GALLAGHER LLP
Attorneys for Defendant Anthony Allen
BY: MICHAEL S. SCHACHTER
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BY: TOR EKELAND
AARON WILLIAMSON

you don't have to show that there was a federally insured counterparty for each count if there was at least one federally insured counterparty --

THE COURT: But the scheme contemplated harm to federally insured financial institutions.

MR. YOUNG: That's correct. And so if we have one financial institution --

THE COURT: So the answer to my question is that no count is dismissed ipso facto by my ruling on this motion.

MR. YOUNG: That's correct.

THE COURT: Let's turn to the motion. I continue to believe, and I thank the parties for their papers and for the government's valiant attempt to reargue the matter. But I continue to believe that the indictment fairly read does not charge that Rabobank was affected in any sense. The government, fully aware of this Court's opinion in the Countrywide case, could easily have presented the grand jury with an indictment that said Rabobank is affected. It doesn't say that. Indeed, I don't think it surfaced in any respect so far as the Court is concerned until the motions in limine.

There are snippets in the indictment that if cobbled together by an adroit cobbler could support the government's position, but I don't think they really constitute a fair reading of the indictment, given how simple it would have been to make a direct assertion of the kind the government now

asserts.

I also think that this belated assertion is prejudicial to the defendants because it's by no means clear to me that the relevant part of Rabobank is federally insured, that Rabobank appears to be, from the little bit I can tell from the papers presented on this reconsideration, an entity that has an unusual or at least unfamiliar organization of its various affiliated components.

And we are talking now about a component in California nowhere mentioned in the indictment that has a relationship with the rest of Rabobank and particularly the portion of Rabobank in which the government's witnesses were involved and the portion of Rabobank to which the indictment expressly refers that is obscure at best, and defendants would have wanted to have meaningful discovery on that.

MR. KOENIG: Your Honor, may I be heard on that.

THE COURT: Yes.

MR. KOENIG: I think that the issue is not whether Rabobank NA was affected. The issue is whether Rabobank Netherlands was affected. Under U.S.C. 20, I believe it's Section 6, Rabobank Netherlands is a bank holding company, and a bank holding company qualifies as a financial institution if it has control and ownership of an FDIC insured entity.

It misses the argument a little bit to say that Rabobank NA is not affected. We are not alleging an effect on

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UNITED STATES OF AMERICA,

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ANTHONY ALLEN and ANTHONY CONTI,

Defendants.

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New York, N.Y.
October 21, 2015
10:00 a.m.

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

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time either side had any exhibit that was relevant to their case, but had nothing to do with a witness who was on the stand, they would say, well, it's relevant and it's been stipulated, it's a business record or it's been stipulated, it's not hearsay or so forth. I am going to put it in because I can make a nice rhetorical point at this point in the chronology through the use of that exhibit and that, I think, would be totally disruptive of the efficient organization of this case. I hear your argument and you may well be able to put it in later, but not through this witness. The objection is sustained.

MS. SIPPERLY: Your Honor, if I may, the witness testified about those e-mails in the context of his absence. It was a practice of what the traders did when Mr. Robson was absent.

THE COURT: Notwithstanding your further explanation, I adhere to my ruling.

I want to rule and quickly because I have to go perform a wedding in 12 minutes. On the very interesting issue that both sides have favored me with very excellent papers and arguments, and that is the government's motion to introduce evidence to prove that Rabobank was an affected financial institution within the meaning of 18 U.S.C. Sections 20 and 3293(2) and, more generally, whether they can make that argument at all. And not to leave you in suspense before I

give my reasons, I'll give you my bottom line, that motion is denied, and I will not allow the government to do that.

What made it a closer call than I had first recognized was, I am persuaded by the government that this is not a constructive amendment. The superseding indictment at paragraph 28 says: "The scheme had an effect on one or more financial institutions within the meaning of Title 18, United States Code, Sections 20 and 3293(2). The conduct of the conspirators caused financial institutions to be susceptible to substantial risk of loss and to suffer actual loss." Now, it is quite true that the rest of the indictment fleshes that out without reference to Rabobank and with specific reference to the banks that were the counterparties, such as Bank of America and Citibank, and that will be relevant in a minute.

But I think that given the general allegation that the statute of limitations, in effect, was 10 years because of the effect on a financial institution, it does not constitute a constructive amendment to prove then that it was some other institution than the ones particularly identified in the indictment. It seems to me similar to the overt act cases in that respect.

Putting it a different way, double jeopardy clearly would attach so that, for example, if all that was shown was an effect on Citibank and Bank of America and the defendants were acquitted, the government could not bring a new indictment

saying, okay, this time we are alleging an effect on Rabobank. That would be clearly barred by double jeopardy. And this is really the other side of that coin. It's not a case of a constructive amendment. It's not an essential element alleging that there is an affect on institutions may well be an essential element. Saying we now propose to prove a different institution than the ones particularized in the indictment is not to change the nature of the essential element.

However, I think there is a prejudicial variance. And the fact of the matter is that the kind of effect that's being premised as the effect of Rabobank is of a very different nature than the effect that is particularized in the indictment with respect to Citibank and Bank of America.

The allegation that's now being offered with respect to Rabobank is that the employees allege misconduct in bringing LIBOR-affected Rabobank through, in effect, a form of respondeat superior, or if it was done not as a matter of law but as a matter of facts, by subjecting them to various investigations and inquiries that they had to spend money and responding to and so forth. It's really a very different kind of approach and it came very late in the day. I've heard competing arguments and all this.

It seems clear to the Court that no real notice of this was given until, at the earliest, September 8 in the e-mail that we have seen previously. Some of the relevant

discovery was not provided until October. The parties were aware that it was only with some reluctance that the Court had even moved the trial date from October 5 to October 13 and that consistent with the mandates of the Speedy Trial Act that this Court was determined to bring this case to trial in October. And so to have this very different form of affect raised so late in the day, at a time when any reasonable defense counsel would have been extraordinarily busy preparing against what had previously been alleged, was on its face prejudicial to the defendants.

Moreover, I think the language of a number of cases that talk about how the affect has to be direct suddenly comes into play here because the purpose of 18 U.S.C. Section 3293 and the purpose of Congress' legislation in this area generally, it is in substantial part to protect the public Fiske, as Congress in the house report on FIRREA states, that one of the purposes is, quote, to put the Federal Deposit Insurance Funds on a sounder financial footing for the future. That's a reference to the house conference report No. 101-222, dated August 4, 1989.

Applying that in the unusual context of this case, a very different context, for example, from the rather straightforward context of the impact on Countrywide and Bank of America in the case that I had previously in this area, here the effect, so far as anything the government has offered, is

on the holding company in the Netherlands, but the insurance applies to the fourth tier subsidiary -- I guess not technically a subsidiary -- fourth tier holding in California.

While I find there is prejudice, in any event, if we were to go forward, the government, in the Court's view, would have to show not simply the effect on Rabobank Netherlands, but the effect, which I think would be very difficult to show and certainly would not be direct and certainly has not been part of their proffer, on the Rabobank entity in California, which my law clerk says is merely a third tier entity, not a fourth tier, so I make that correction.

Putting it in a different way, the reason Congress included holding companies was to avoid loopholes or make sure that the public Fiske was not being evaded in a case involving significant impact on federally insured institutions by the fact that there was a holding company involved. That was their model, looking at the impact on the federally insured institution, but in making sure that holding companies could be held liable. But here it's really the reverse. The impact is on the holding company, if at all, not on the federally insured institution.

While I don't need to reach that, because I find there was sufficient prejudice in any event, that reinforces my conclusion that it would be a prejudicial variance to allow the government to proceed at this time with the argument that

Rabobank was an affected financial institution.

Accordingly, the government's motion is denied. I am not going to hear anything more because I have to go literally right now. Anything you want to say, I will be perfectly happy to hear you at 10:00 tomorrow, but I must leave.

(Adjourned to Thursday, October 22, 2015, at 10:00 a.m.)